1968

State of Utah, by and Through Its Road Commission v. J. S. Prestwich, M. D. and Leatha Graff Prestwich, His Wife : Brief of Respondents

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Appellant,

vs.

J. S. PRESTWICH, M.D. and LEATHA GRAFF PRESTWICH, his wife,
Defendants and Respondents.

Case No. 11263

BRIEF OF RESPONDENTS

Appeal from Judgment of the Fifth District Court
For Beaver County
Honorable C. Nelson Day, District Judge

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action in eminent domain commenced by Appellant in December 1963, to condemn 50± acres of the property of the Defendants, PRESTWICH, et ux., for the development and constructon of Interstate Freeway I-15 in the area of Kanarraville, south Iron County, Utah. The Appellant appeals from the Judgment of Just Compensation entered on the jury verdict by District Judge C. Nelson Day on March 12, 1968.

DISPOSITION OF CASE IN TRIAL COURT

Upon venue change to Beaver County, the case proceeded to trial by jury on the issues of land value of the "taking" and damages to the remainder, the questions of the right to condemn, public use and necessity and other jurisdictional requisites having been admitted in the Appellant's favor.[1] Both sides put on testimony as to fair market value and damages to the remainder, it being:

For the Landowners:

June S. Barron, Cedar City Appraiser (R. 214, 232)

Value of 50.07 acres taken	$ 8,608.60
Damages to the remainder	33,428.40
Total Opinion on Compensation	$42,037.00

Marcellus Palmer, Salt Lake City Appraiser (R. 362, 380)

Value of 50.07 acres taken	$ 9,106.90
Damages to remainder	29,839.50
Total Opinion on Compensation	$38,945.40

For the State:

Memory Cain, Salt Lake City Appraiser (R. 467, 468, 471, 483, 485)

Value of 50.07 acres taken	$ 6,651.60
Damages to remainder	00.00
Total Opinion on Compensation	$ 6,651.60

[1]The pages in the case file of the Court Clerk, as transmitted to the Court on appeal, have not been numbered. Accordingly, the case file will be cited and referred to generally when necessary.

W. Iverson, Washington County Rancher (R. 557, 558, 576)

Value of 50.07 acres taken .....$ No final opinion
Damages to remainder ..... (admitted existence of severance damages but could not calculate them)

After four days of trial, the jury returned its verdict into open Court on March 7, 1968, as follows:

1. Market Value of the 50.07 acres condemned .....$ 7,850.50
2. Damages to remainder 26,674.50
3. Total verdict $34,525.00

The Appellant filed motions for new trial, N. O. V. and elimination of all severance damages. (See case file.) All of said motions were, upon hearing, denied at the bench by Judge Day. The State appeals from the Judgment on the Verdict. (See case file.)

RELIEF SOUGHT BY APPELLANT ON APPEAL

The State does not seek a reversal and new trial by its appeal herein. Rather, it requests that this Court reduce the Judgment of Just Compensation by striking or eliminating therefrom "all severance damages" (App. Br. pp. 3-4, 15).

STATEMENT OF FACTS

Appellant's Statement of Facts is nearly incomprehensible, disjointed, substantially inaccurate, without rec-

ord citation whatsoever, and replete with argument. Such Statement is not susceptible to response by Respondents in accordance with Rule 75(p)(2) U.R.C.P. Accordingly, Respondents will make their own Statement of the record of trial:

1. *Total property BEFORE condemnation.*

   (a) The subject property, before condemnation, was a cattle ranch of better than 1800± acres immediately west and north of Kanarraville (R. 47, 49-50). Situated in what was known as the north, south and center fields, the total farm had been developed as a balanced ranching property, consisting of meadow, irrigated and dry cultivated acreage and grazing land (R. 70-79).

   (b) Under the best use of the farm, substantial east-west, northeast-southwest, northwest-southeast and converse movement was involved (R. 82-83, 172-173, 198-200, 337, 341-342). There were no limitations in going to and from the various fields of the ranch prior to condemnation, access being provided by a typical north to south county farm-road through the bottom land (R. 73-75, 79-81, 167-168). Beef cattle were fed-up and grazed throughout the ranch by continual rotation from field to field depending upon the growing season and weather (R. 78-81). Through this rotation of livestock and cropping, the

Respondents' livestock of several hundred head, were maintained the year around.

(c) In 1956, the landowners filed with the State Engineer Application No. 28407 to drill a well and appropriate water up to 3 second feet for the irrigation of some 260 acres of land in the west section of the north field (Ex. 13, R. 56-59). After adjudication and other water hearings in the early 1960's, the Prestwich application was "designated for approval" by the State Engineer in August 1963, four months before the date of condemnation herein (R. 257). Called by Respondents to testify, the State Engineer Hubert Lambert said that under the experience of the Engineer's office as of August 1963, only 1% of all water applications which had received "a designation for approval" by the State Engineer were thereafter disapproved (R. 262). And the Prestwich application, itself, was given formal approval by the Engineer in April 1964, without any further facts being considered other than those already known in August of 1963 when the application was "designated" for approval (R. 265, Ex. 13). Contrary to the claim of Appellant herein, the value witnesses for the owners, in appraising the west land in the north field as of December 1963, did not evaluate the same as though the

water under Application No. 28407 were actually being applied to the land (R. 350). To the contrary, the appraisals were premised on dry cultivated land with the probable potential within the foreseeable future of irrigation water under the Application (R. 210-212, 265, 350). Mr. Palmer in his appraisal, made it plain that the west land in the north field would have been substantially more valuable than as appraised by him, if the water under the Application had been actually on the land at the date of taking (R. 350).[2]

(d) In the eyes of the buyer and seller in the open market, the highest and best use of the Prestwich property, prior to condemnation, was as a cattle ranch (R. 195-200, 339-342).

2. *Taking by State for freeway.*

(a) On a north-south access, the non-access freeway cut through the bottom meadow land and middle of the north and center fields and through the west of the south field (Ex. 1). In all, 50.07 acres was condemned.

(b) In the *north field,* 185 acres of potential irrigated crop land were left on the west of the 300 foot wide freeway, permanently sepa-

[2]The State has raised no issue in this Appeal relative to the appraised value by the landowners' experts of the west land in the north field on the basis of its probable potential of irrigated, cultivated land.

rated from the balance of the north field of which it was formerly part and parcel (R. 216, 375-376). No underpass or crossing was provided in the north field to get from one side of the freeway to the other (R. 28).

(c) In the *center field,* 300 acres of crop land was left on the west of the freeway permanently separated from several hundred acres on the east of which it was formerly part and parcel (Ex. 1). Only an "arched" overpass serving a former east-west county road provided access to the 300 acres.

(d) In the *south field,* the former access to the county farm-road on the west was permanently blocked-off by the freeway. After condemnation, in order to get to the south field from the balance of the farm, the owners were required to go into the Town of Kanarraville (Ex. 1, R. 217). As admitted by Appellant, an underpass and drainage box constructed in the south field by the State, had its entrance and exit on different property ownership and thus "made the box unusable as a livestock underpass" (App. Br. pp. 1-2).

3. *Damage to remaining property AFTER condemnation.*

In addition to the foregoing, the evidence was that the following elements would be taken into account by the

buyer and seller in determining whether the remaining property west and east of the freeway had been diminished in value as a result of the taking and the *construction of the freeway project*:

(a) Substantial disability in rotation and irrigation of remaining crop land in the north and center fields had been and would be experienced by the owners (R. 82-98, 216-220, 362-370). Land formerly irrigated could no longer be watered as a consequence of the freeway alignment (R. 83-87, 217-218).

(b) To get from east to west of the remaining property in the north field (formerly a distance of about 40 feet), the landowners, for example, were now required to travel some 3.5 miles down a frontage road, over the "arched" overpass, around a sharp curve and back up another frontage road to the other side. Such effort and its converse were and would be continually required in order to maintain minimum irrigation systems and crop rotation in the north field (R. 217, 96-97).

(c) The ranch had been sliced up into arbitrary parcels east and west of the freeway. The latter acted as a barrier prohibiting all east-west movement and rotation of property use, except at the "arched" overpass (R. 216-219, 362-363). The remaining severed parcels im-

mediately east and west of the freeway could not be operated as economically and conveniently after condemnation as they were operated before condemnation as an integrated and unified field (R. 82, 366, 216).

(d) Substantial disability was and would be encountered by the owners in the movement of cattle on the remaining property from one side of the freeway to the other (R. 96-97, 218-219, 314, 370). Livestockmen and cattlemen from throughout the state, including the chief farm appraiser of the State Road Commission, testified that the "arched" type of overpass will not work in a ranching set-up inasmuch as beef cattle cannot be feasibly and practically driven over such an air structure. The owners have been and were forced to truck, for the first time, livestock from east to west and returning on the remaining property, a time-consuming and expensive burden in the operation of the land (R. 366). Other cattle ranches in the state of comparable scope to the subject property, which had been similarly broken-up by a freeway, were analyzed (R. 371-372). It was found by the appraiser that the remaining severed lands adjacent to the freeway had sold on the open market for substantially less after condemnation than the price for which they had been purchased before condemnation (R. 371-

372). In the landowners case, no damage to the remaining property east or west of the freeway, was predicated whatsoever *on the sheer physical loss or shrinkage in the size of the total ranch by reason of the taking* of the 50± acres.

4. *The so-called replacement or cost of cure issue.*

The "cost of securing replacement-substituted land" was never a legitimate good-faith issue in the case. The State made no offer of proof to show that other lands were available in the immediate area which were comparable in *quantity* and *quality* to the property condemned and which would "*cure*" the damage otherwise caused by the severance and isolation of the remaining parcels *so as to restore the remaining property and the landowners to their former economic position.* But it now claims on Appeal that under the testimony of the Respondents' witnesses, two sales of 80 acres each in May and June 1964 of land *to the west of the freeway* and north of the remaining west section of the Prestwich north field invokes the "replacement or cost of cure" rule in the case, so as to entitle the Appellant to a judgment eliminating all severance damage in the case (App. Br. pp. 6-8, 14).[3] So far as the replacement or cost

[3]Contrary to Appellant's claim, the record shows that these two sales (referred to as the Callewaert and Piernes transactions), were introduced and received in evidence solely as *severed tract transactions* as a basis for proving the diminution in the value of the severed property of Prestwich to the west of the freeway. In other words, Callewaert and Piernes, were a reflection of what happens to the value of *severed parcels* which were left on the west of the freeway in the area of the Prestwich ground.

of cure is concerned, the Callewaert and Piernes property were already severed tracts lying to the west of the freeway, inferior accesses partly landlocked, without water and with no water potential and rough uncultivated land (R. 229-231).

The position of the Respondents on this spurious issue was consistent throughout the trial, viz., that the "replacement or cost of cure" rule had no application in the trial since such lands even if available could not cure the damages mentioned in paragraphs 2 and 3 above and restore the landowners to the same comparable economic position as existed before the taking (R. 344). And further, assuming arguendo, the applicability of the issue, the owner himself testified that as of the date of taking, December 1963, he knew of no other comparable land available to him for sale in the area (R. 104). The State did not disprove the truth of such statement by any witness nor did it call its own witness to show that as of December 1963, any such lands were available for sale to Prestwich.

The trial Court, in discourse with counsel, indicated its awareness and judgment as to the inapplicability of the "replacement or cost of cure" rule in the case (R. 345-346).

5. *Appraisal testimony of landowners.*

Appellant's claim that the condemnees' appraisers did not evaluate the subject property Before and After the taking is a misrepresentation of the facts of trial. The record is clear that among other things, both Barron and Palmer gave their judgment as to:

(a) Fair market value of the subject property and each part thereof viewed under its highest and best use before condemnation (R. 197, 207-216, 340, 358-361, 375-378);

(b) The fair market value of the 50.07 acres condemned, view in relationship to and as a part of the larger ranch (R. 213-214, 359-362);

(c) The fair market value of the remaining property after the expropriation and the construction of the freeway. Each testified that the "after value" of the remaining property was the same as that before the taking, *except* for specific areas proximately severed and affected by the freeway. As to the latter, damages to said property were ascertained by determining the difference in its fair market value *before and after* the taking (R. 216-226, 362-363, 375-378).

6. *Appraisal testimony of Appellant.*

Memory Cain: The leading witness for the State, Cain had been a staff appraiser for the Road Commission until 1965. While he thereafter classified himself as a "fee appraiser" between 1965 and 1968, all of said appraisals (save two for Richard Dibblee) had been made for the Utah Attorney General or special counsel (R. 442, 492-493). His practice was to make appraisals of property which were already in condemnation and awaiting immediate trial (R. 498). He had never appraised a single property in Utah or anywhere else for a rancher, farmer, or any agricultural property owner, either in or out of con-

demnation. When asked why he had left the State employment thereafter to work continually for the State (or the Attorney General) on a non-employee basis, the witness answered "I can make better money this way" (R. 501).

Cain made no inspection of the total property of these owners (R. 504-505, 506-507). He made no investigation as to the holdings in the ranch, water rights, past operation and rotation or the highest and best use of the total property. Cain appraised only the 50.07 acres condemned and a small landlocked parcel (R. 506-513). And while he did not appraise the remaining property knowing not of what it comprised, he nonetheless concluded that it had sustained no damage (R. 509, 467, 468, 471, 483, 485).

W. Iverson: A life-long resident and rancher in Washington County, Iverson had been requested by Appellant's counsel only a few days before trial to appraise the condemned 50.07 acres and no more (R. 564). While Iverson had not been requested to detemine damages to the remaining property, the witness opined on cross-examination that the remaining property of Prestwich *was worth less "after" that it was "before" the taking,* but he had not had time to determine how much the damage would total (R. 576).

ARGUMENT

POINT I.

THE CASE WAS PROPERLY AND FULLY TRIED BY DISTRICT JUDGE DAY AND THE APPELLANT'S APPEAL LACKS ALL SUBSTANCE.

Few condemnation appeals have ever been brought before this Court which possessed less merit than does this one. The issues raised herein lack both genuineness and originality — genuineness because the questions posed are not actually raised in or supported by the evidence of trial — originality because the questions raised have already been firmly settled under the case precedent of this Court in which the Attorney General participated.[4]

The case was tried as a typical partial-taking of a farm or ranch property under the same legal framework as numerous other agricultural condemnation suits, involving the Interstate Highway, in Utah. That framework is 78-34-10 (1), (2) and (3), U.C.A. 1953, which Statute lays out the triable issues as:

(1) The fair market value of the property condemned, together with improvements thereon as of the date of taking;

(2) "If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance * * * and the construction of the improvement * * *";

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[4]Although indirect, yet in a very real sense, Appellant, under Points I, II and III of its Appeal, requests that this Court overrule and set aside the recent holdings in *State Road Comm.* v. *Howes,* 20 U. 2d 246, 436 P. 2d 803 (1968), *State Road Comm.* v. *Style Crete, Inc.,* 20 U. 2d 365, 438 P. 2d 537 (1968), and *State Road Comm.* v. *Jacobs,* 16 U. 2d 167, 397 P. 2d 463 (1964). Such decisions would, of necessity, have to be overturned in order to sustain Appellant's position herein.

(3) "If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages." 78-34-10 U.C.A. 1953.

The testimony of the landowners on the value of the expropriation and damages to the remainder, the Verdict of the jury, and the Judgment entered thereon are each and all within the letter and spirit of these statutory issues. And the evidence of the landowners fully complied with the case rulings of this Court regarding proof and establishment of land value and severance damage to remaining property. *State Road Comm.* v. *Hansen,* 14 U. 2d 305, 383 P. 2d 917 (1963); *Southern Pacific Co.* v. *Arthur,* 10 U. 2d 306, 352 P. 2d 693 (1960); *State Road Comm.* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76 (1961); *State Road Comm.* v. *Taggart,* 19 U. 2d 247, 430 P. 2d 167 (1967). Moreover, the instructions of the Trial Judge (none of which is subject of appeal herein) were in complete symmetry with the evidence at trial, the statutory issues, and the decisional precedent with respect to value of the condemned land and damages to the severed and remaining property.

The value witnesses for each side presented a striking imbalance. For the Respondents — *Palmer,* whose services have been retained by practically every Governmental agency, Federal, State, and County in Utah (including hundreds of assignments for the State Road Commission) (R. 330-332) retained by small and large farmers and the major livestock outfits in the State (R. 328-329), and probably the most qualified agricultural appraiser in Utah,

gave testimony of documented case study of what happens to the market value of the remaining property of a ranch when a non-access freeway cuts it into fragmented parts with no provision for farm underpasses. — *Barron,* a conservatively oriented appraiser, long an employee of the Farmers Home Administration in Cedar City, had appraised and was familiar with more real property in Iron County than any other witnesses.

Against Palmer and Barron, the State called two witnesses: — *Cain* never appraised or testified as an expert for anyone except the Attorney General. A "fee" appraiser on continual retainment from the Attorney General, he had never appraised property for any landowner in condemnation. His testimony at trial, particularly on cross-examination, stands as an almost classic example of inconsistency. — *Iverson,* a rancher from Washington County who acknowledged and admitted that there were severance damages to the remainder, was not able to calculate their amount because he had not been requested to and wasn't given the time to appraise such damages.

The rather complete lack of credibility in the State's evidence underscored the brute facts of the case — that the Road Commission had constructed a non-access freeway for more than three miles through the center of one of the largest irrigated ranches in Iron County, severing some 485 acres on the west from the balance of the farm with no means of crossing provided for the owner to get to and from the remainder lands. Only an "arched" overpass near

the center field prevented the entire property on the west from being landlocked and such structure could not be practically used for driving beef cattle. Along with the 3.5 mile trips to reach the west or the north field (formerly a distance of only 40 feet), these were some of the problems which confronted the buyer and seller in purchasing the remainder property after condemnation.

The issues of land value and severance damages were questions of fact for the jury whose decision this Court is loathe to disturb. *Weber Basin Conservancy Dist.* v. *Nelson*, 11 U. 2d 253, 358 P. 2d 81 (1960); *State Road Comm.* v. *Stanger*, 21 U. 2d 185, 442 P. 2d 941 (1968).

The jury verdict on severance damage is, in whole, supported by the substantial evidence as above indicated. Such verdict is not to be set aside on this appeal in what amounts to a "rehash" of law questions previously decided by this Court.

POINT II.

THE TRIAL COURT PROPERLY CONCLUDED UNDER THE RULING PRECEDENT THAT THE LANDOWNER HAD, INDEED, MET THEIR BURDEN OF PROVING SEVERANCE DAMAGES TO THE REMAINDER PROPERTY.

The issues raised by Appellant are the subject of quick resolution once the testimony and rulings of the Trial Court are known. The State, in Point I of its Brief, seems to claim that the owners were not entitled to the recovery of

severance damages to the remainding property because, to us their words: "In no place did the Defendants make any offer whatsoever of any proof to show that they were entitled to severance damage". (App. Br. p. 5). As alleged support for such statement, Appellant cites and quotes from *State Road Comm.* v. *Howes*, 20 U. 2d 246, 436 P. 2d 803 (1968).[5] Appellant then proceeds in the next breath to allege the reason why the owners did not meet their burden of proof on damages, to-wit, because it is claimed there was other available land in the area to "replace" the 50.07 acres condemned. Thus, it is contended that since the condemnees did not make proper proof on such point, all severance damages awarded as merged in the Judgment should be totally stricken. The response to this esoteric claim is not complex. To begin with, it was acknowledged at trial and is admitted here that the owner, in eminent domain, must go forward with evidence and proof on the issues of land value within the taking and damages to the severed and remainder property. Such principle, however, was apart of the ruling law in this jurisdiction long before the dicta in *Howes*. A series of decisions have so held.[6]

Simply put then, the question is what factors need the owner prove in his case to make a prima facie showing of

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[5]The citation from Howes in Appellant's Brief, p. 5, is a misquote of Justice Callister's opinion. The quoted sentence is not, in fact, complete and self-contained as made to appear, but rather is part of a larger sentence and statement.

[6]*Oregon Shortline R. Co.* v. *Russell, et al.*, 27 Utah 457, 76 Pac. 345 (1904); *Tanner* v. *Provo Bench Canal and Irrigation Co.*, 40 Utah 105, 121 Pac. 584 (1911); *State Road Comm.* v. *Peterson*, 12 U. 2d 317, 366 P. 2d 76 (1961).

entitlement to severance damages?[7] The answer is that the burden of going forward on the issue of severance damages is made by:

(1) factual proof that the property condemned is but part of a larger remaining property, contiguous or non-contiguous, having the same highest and best use and unity of ownership; 4 *Nichols on Eminent Domain,* 494, §14.1 et seq.;

(2) expert or landowner opinion that, by reason of the "taking" and construction of the freeway as proposed, the remaining property or particular parts, have been diminished in the former market value. In making such proof, the "before and after" rule is applicable. *State Road Comm.* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76 (1961); *State Road Comm.* v. *Ward,* 112 Utah 452, 189 P. 2d 113 (1948). 4 *Nichols on Eminent Domain,* 511 §14.21.[8]

That 78-34-10(2) and (3) and the decisions of this Court (if not the constitutional mandate of Art. I §22),

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[7]Indeed, what factors does the owner need to prove to show market value of the land within the actual taking? The cases are legion that expert testimony on fair market value, or even the testimony of the owner himself, is quite sufficient to sustain the burden of proof and award. *Southern Pacific Co.* v. *Arthur, supra; Provo River Water Users Assoc.* v. *Carlson,* 103 Utah 93, 133 P. 2d 777 (1943); *State Road Comm.* v. *Woolley,* 15 U. 2d 248, 390 P. 2d 860 (1964).

[8]And of course, damage to remainder property must be special to the particular property involved, i.e., damage that is directly attributable to the highway project and the taking. 4 *Nichols on Em. Dom.* 475 §14.1. No objection or question on this factor was at all raised in the trial.

contemplate and require no more and no less than these factors, is elementary and beyond reasonable debate. The landowners herein made precisely this proof at trial. In detail, testimony was given as to the total ranch, its best use in operation, water rights, and different types of property. The condemned property was identified in its relationship to and as a part of a larger ranch. And the value witnesses for the Respondents testified without equivocation with respect to the remainder property, its value *before and after* condemnation, and as to the remainder property directly affected by the taking, the *before and after* values of the same.

What other conditions or factors need be proven by the landowners under its burden of proof? The Appellant does not say or specify in its Brief, save possibly one – namely, the purchase of so-called replacement land to cure the severance damage.

1. *"Replacement or Cost-to-Cure" rule is totally inapplicable.*

The gist of what Appellant's counsel says in his Point I, is tied up in the "replacement or cost-to-cure" rule of severance damages. Although the State made no offer of proof as to the availability in December 1963, of any replacement property in the area which would cure the severance injuries outlined in paragraphs 2 and 3 of this Statement of Facts, it is nevertheless contended that somehow under the authority of the *Howes* decision, the owner had the burden of showing the unavailability of such land as a condition to the recovery of severance damages. And fur-

ther, it is argued that if there were other land available for purchase, these owners had an obligation to make such purchase *out of pocket* in order to mitigate damages.

Appellant should re-examine the decision in *State Road Comm.* v. *Howes, supra,* for the ruling which evolved in that case is the precise antithesis of that which State counsel claims for it herein. For in *Howes,* this Court writing through Justice Callister, flatly held that the condemnee is not required, as a condition to the proof and recovery of severance damages, to show the unavailability of other property in the area:

> "We hold that in a condemnation action it is the condemnee's burden to prove severance damage, but that before doing so he does not generally have the burden of first showing that such damage, if any, could not be minimized or mitigated." 436 P. 2d at 804.

By Point I of its Brief, Appellant reargues the same point which the Appellant argued in *Howes* and lost. But even apart from the question of whose burden it is to raise the "replacement" issue, it is a fair statement that with respect to the merits of this particular principle of damages, no one who has reasonably read and understood the decisions of this Court[9] on this point and thus, the presently developed state of law, could seriously urge its application in the case at Bar.

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[9]See the discussion in *State Road Comm.* v. *Howes, supra,* and the latest opinion of *State Road Comm.* v. *Style Crete, Inc.,* 20 U. 2d 365, 438 P. 2d 537 (1968), both of which directly deal with the "replacement" principle, and the application of the *Carlsen* and *Co-op Security* holdings in a severance damage case.

It is crystal clear and beyond argument that the damage to the remainder property west and east of the freeway as described in paragraphs 2 and 3 of the Statement of Facts herein could not conceivably be cured by purchasing other properties in the area (even assuming, arguendo, that other property was available). Under the holding of this Court in the *Howes* and *Style Crete decisions*, the "replacement or cost-of-cure" rule is only relevant and admissible on the question of severance damages when:

(a) substantially comparable property in quality and quantity, is known to be available to the condemnee for sale as of the date of taking; and

(b) such property purchase, if substituted for and in place of the property actually condemned, will *cure* the severance damages otherwise caused so that the owner is in the same "relative position as before the taking". *State* v. *Style Crete, Inc., supra.*

The claim of Appellant, thus viewed in the light of *Howes* and *Style Crete*,[10] is spurious. Such claim, in substance, is that because two 80 acre pieces (on the west side of the freeway) to the north and west of the remaining ranch sold five to six months after the date of taking, the law requires, in determining severance damages, that these owners purchase the same in mitigation. In fact, the land was not comparable in either quantity (160 acres to 50.07

[10]Appellant has failed to refer to the *Style Crete* holding, although it was substantially referred to and discussed on the motion for new trial before Judge Day.

acres) or quality (rough uncultivated acreage as against cultivated and meadow land condemned). But just as important, the purchase of said additional tracts by these owners would not have at all *cured* the severance damage or *restored* the owners to their former position as required by *Howes* and *Style Crete. Indeed, such purchase would have amplified and enlarged the severance damage because there would have been more severed property on the west of the freeway.* And so it was, that Judge Day was not in error when after substantial discussion with counsel and consideration of the State's theory as it related to *Howes* (and later *Style Crete*), he ruled that the "replacement" rule had no relevancy in the trial.

The last part of Appellant's argument (page 8 of its Brief), that the owners must purchase the claimed replacement property *at their own expense* to mitigate severance damages, is equally spurious. The *Co-op Security* and *Carlsen* cases, as discussed in *Style Crete* and *Howes,* do not say any such thing, and this Court has never intimated that such a bizarre result might be in store for a landowner in a partial-taking case. *Carlsen* and *Co-op Security* hold that if and when the "relacement" rule is applicable, *severance damages are to be measured by the cost* of acquiring the comparable substitute property and that cost is to be assessed and awarded as part of the Judgment of Just Compensation. Yet Appellant in Point I asks the Court to strike from the Judgment all severance damages. Even under their erroneous theory, as warped as it is, substantial damages would be owing to the landowners.

In all, Point I of Appellant's Appeal illustrates a lack of appreciation of the "replacement or cost-to-cure" rule and its relationship to the severance damage concept in eminent domain. The trial court did not err and it should be affirmed.

POINT III.

THE TRIAL COURT PROPERLY CONCLUDED THAT THE EXPERT WITNESSES FOR THE LANDOWNER DID APPRAISE THE SUBJECT PROPERTY AND SEVERANCE DAMAGES IN ACCORDANCE WITH THE LAW.

Appellant claims in Point II of its Brief that the trial Court erred in determining that the expert witnesses for the landowners, in determining severance damages or the difference between the damaged property before and after condemnation, improperly evaluated such damage under the law. The reason given for the claim is that the Defendants "having elected" to consider the ranch as an "economic unit", were required to appraise the total ranch before and after condemnation. The argument is a paradox and again, stems from the failure to recognize the law issues before the Court in a severance damage case and the in-fact evidence received. Appellant's argument is without merit.

Contrary to Appellant's lament, there is nothing at all magic about the conclusion, made by the experts, that the ranch, before condemnation, constituted a total ranch unit. Such result is merely a part of the general investigatory

and conclusion process of the appraiser which is necessarily involved in every partial-taking case. McMichael's *Appraising Manuel,* Appraising for Condemnation, p. 456 (5th Ed.). As to the admissibility of evidence with respect to severance damage, the appraiser must, indeed, investigate the larger property, a part of which is condemned, as a condition to testimony on damages to the remainder caused by the severance and highway construction under 78-34-10(2) and (3) U.C.A. 1953. Elsewise, the expert would be in no position to conclude that the condemned property was but part of a larger tract of land with unity of use and ownership. *Bauman* v. *Ross,* 167 U. S. 548, 42 L. Ed. 270, 17 S. Ct. 966; 4 *Nichols on Eminent Domain* 511 §14.21.

In all events, the record herein reflects fully that the landowners' experts, Palmer and Barron, did just that which Appellant claims should have been done — they did appraise the entire ranch before the taking; they did evaluate the fair market value of the 50.07 acres condemned, viewed as part of the larger property; they did evaluate the remaining property after condemnation and they did determine damages to said remainder by determining in their judgment, the difference in the fair market value of the said property before and after condemnation. *The record could not be clearer on this point* and Appellant's attempt to distort or portray the testimony otherwise as it claims in its Brief is unworthy of the Appellant.

The testimony before the Court wholly parallelled the approach to value pursued by the witnesses in *State Road Comm.* v. *Peterson,* 12 U. 2d 317, 366 P. 2d 76 (1961) (a

ranching operation) and thus is in harmony with the pronouncement of this Court in that case:

> "As to the error assigned in instructing on damages: *notwithstanding the zealous efforts of counsel to torture them,* we think they were such that the jury understood and applied the correct measure of damages: for the land actually taken: the fair cash market value on the date of condemnation; *and for severance damages to the remainder: the difference between its fair cash market value before and after the taking.*"

There was no error.

POINT IV.

THE TRIAL COURT PROPERLY RECEIVED EVIDENCE OF THE PROBABLE POTENTIAL OF THE WELL APPLICATION NO. 28407 AS THE SAME RELATED TO THE VALUE OF THE WEST SECTION OF THE NORTH FIELD BEFORE CONDEMNATION.

Lastly, Appellant argues that Judge Day erred in allowing the experts for the owners to speculate on the approval of well Application No. 28407 in determining the value of the condemned property before condemnation. In so arguing, Appellant does not suggest how such testimony was prejudicial to the result in the case, a responsibility which it clearly has to this Court. *Lemmon* v. *D. & R. G. W. R. R. Co.*, 9 U. 2d 195, 341 P. 2d 215 (1959). And the relief which the Appellant requests in this appeal has no relationship, in fact or law, to the question raised in Point III of its Brief.

Nevertheless, the short response to this claim is that the testimony of the Defendants on the water Application was not speculative in law. The evidence shows beyond dispute that the State Engineer had "designated" the Application (on file since 1956) for approval four months prior to the date of taking herein, and the State Engineer, himself, testified that the Engineer typically gives formal approval to 95% of those applications as to which "approval designation" is given. Testimony was also given as to the general water geology of the area and the probability of water on drilling. But the important part of this testimony was that the value of the land under the Application was not appraised as though the water from the well was in fact, being pumped and applied. Rather, the property was appraised as it was found in the market as of the date of taking with the probable potential in the foreseeable future of water being available via the application. Such testimony and evidence fully accords with the "rule of probability" in eminent domain as recognized by this Court throughout the decisions. *State Road Comm.* v. *Jacobs, supra; Tanner* v. *Provo Bench and Canal Co., supra; State Road Comm.* v. *Estate of Ida Holt,* 14 U. 2d 235, 381 P. 2d 724 (1963). Whether such evidence, once admitted, was credible and to be believed was a question of fact solely for the jury and its determination will not be overturned.

CONCLUSION

The appeal by the State herein is a complete non-sequitur. It asks that the Court recognize the Judgment of Just Compensation as valid so far as value of the con-

demned land is concerned, but declare the same Judgment invalid with respect to severance damages. Such request legally is an impossible accomplishment since there is but one judgment in which is merged all factors of Just Compensation as by law defined in 78-34-10 U.C.A. 1953. The integrated judgment is either good or it isn't and a party may not appeal piecemeal issues which have been merged in the final judgment. 78-34-16 U.C.A. 1953; Rule 72(a) U.R.C.P.; *Thomson* v. *Thomson,* 5 Utah 401 (1888); 4 Am. Jur. 2d 571, App. and Err. §49; 4 C.J.S. 297, App. and Err. §109.

In asking not for a new trial but the elimination of severance damages from the Judgment, Appellant's appeal is even more of a paradox. For under its "replacement" theory, as erroneous as its is, there would have to be recognized substantial severance damages in accordance with the controlling case law and due process. (See Point II paragrap (1) herein).

This case was properly and typically tried by District Judge Day. A verdict, after four days of trial, was returned fully supported by the believable evidence. The appeal herein is without legal significance under the already established precedent, and this Court should affirm the Judgment of the trial Court, we do respectfully submit.

Respectfully submitted,

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